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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court Of The United States

October Term, 1986

AMERICAN CAST IRON PIPE COMPANY,
Petitioner

vs.

ANNETTE COX, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the court below, in exercising appellate jurisdiction over the appeal filed by the 18 nonprevailing plaintiffs, when five motions to alter or amend the judgment were pending before the district court at the time their notice of appeal was filed, and the 18 nonprevailing plaintiffs did not file a second notice of appeal subsequent to the district court's ruling on these five post-trial motions, render a decision in total disregard of Rule 4(a)(4) of the Federal Rules of Appellate Procedure, in direct conflict with applicable decisions of this Court, and in direct conflict with applicable decisions of every other federal court of appeals?

PARTIES

The parties in the court below were as follows:

1.	Annette Cox	Plaintiff-Appellant
2.	Joyce Pandellis	Plaintiff-Appellant
3.	Joyce Crane	Plaintiff-Appellant
4.	Glenda Glenn	Plaintiff-Appellant
5.	Bernice Huffman	Plaintiff-Appellant
6.	Belinda Black	Plaintiff-Appellant
7.	Rhonda Edwards	Plaintiff-Appellant
8.	Jewell Smith	Plaintiff-Appellant
9.	Julia Womble	Plaintiff-Appellant
10.	Glenda Duncan	Plaintiff-Appellant
11.	Mary Jane Seabury	Plaintiff-Appellant
12.	Jerri Ogletree	Plaintiff-Appellant
13.	Mary Diane Lee	Plaintiff-Appellant
14.	Beverly Ann Walker	Plaintiff-Appellant
15.	Daphne Gay Johnson	Plaintiff-Appellant
16.	Judy Lockard	Plaintiff-Appellant
17.	Velma Waldrop	Plaintiff-Appellant
18.	Patricia Ann Terry	Plaintiff-Appellant
19.	Brenda Morgan	Plaintiff-Appellant
20.	Rebecca Self	Plaintiff-Appellant
21.	Karen Williams	Plaintiff-Appellant
22.	American Cast Iron Pipe Company*	Defendant-Appellee

*American Cast Iron Pipe Company, petitioner herein, is a corporation incorporated under the laws of the State of Georgia, and its principal place of business is in Birmingham, Alabama. American Cast Iron Pipe Company is not a subsidiary of any other company, and all of its subsidiaries are wholly owned.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, American Cast Iron Pipe Company ("petitioner" or "Acipco"), respectfully prays that the Court will issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on March 26, 1986. In addition, petitioner respectfully prays that the Court will issue a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit denying petitioner's petition for rehearing *en banc*, which was entered on May 5, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported in *Cox v. American Cast Iron Pipe Company*, 784 F.2d 1546 (11th Cir. 1986). That opinion is reproduced in the Appendix at pages 1-28. The

order denying petitioner's petition for rehearing *en banc* is reproduced in the Appendix at page 31.

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 26, 1986. (App. 29-30). Petitioner's timely petition for rehearing *en banc* was denied without opinion on May 5, 1986. (App. 31). This petition for a writ of certiorari is being filed within 90 days of the Eleventh Circuit's order denying rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 4(a)(4), Federal Rules of Appellate Procedure:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no

effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This sex discrimination action was filed in the United States District Court for the Northern District of Alabama on May 15, 1974, pursuant to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). In their complaint, the plaintiffs, Annette Cox, Brenda Morgan, and Joyce Mitchell, alleged that the defendant, Acipco, discriminated against them on the basis of their sex. Plaintiffs also sought to bring this action on behalf of all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure, specifically "all past, present, and future female employees of defendant who have been, are, continue to be, or will be adversely affected by the practices complained of herein."

On December 23, 1981, one week before he resigned from the bench, District Judge Frank H. McFadden, pursuant to Rule 23(b)(2), Fed.R.Civ.P., certified a class consisting of "all past, present, and future female salaried employees of defendant . . . who have been or are effected [sic] by the defendant's policies as to advancement, training, and compensation, in a way that is prohibited as sex discrimination by 42 U.S.C. § 2000e *et seq.*" On September 27, 1983, District Judge William M. Acker, Jr. entered an order decertifying the plaintiff class and consolidating for trial the individual cases of the plaintiffs and former class members.

The trial of 23 individual cases commenced on December 12, 1983 and continued for four days. Trial resumed on January 19, 1984 for two days, and resumed again on March 21, 1984. All parties rested on March 22, 1984.[1]

[1]At the close of the plaintiffs' cases in chief, the district court dismissed the claims of two of the plaintiffs, Paula Farris and Norma Jean Tucker

On April 30, 1984, the district court entered a judgment in favor of three of the plaintiffs, Brenda Morgan, Rebecca Self and Karen Williams, and against Acipco. The court also entered a judgment in favor of Acipco and against the remaining 18 plaintiffs, except that the court awarded attorney's fees, expenses and costs to those 18 plaintiffs, reasoning that their suit was a catalyst for change in the treatment of women at Acipco. (App. 3).

On May 9, 1984, all 21 plaintiffs filed a Motion for New Trial, or in the Alternative, to Alter and Amend the Judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure. The three prevailing plaintiffs sought additional back pay, front pay, overtime, bonuses, fringe benefits and prejudgment interest. The 18 nonprevailing plaintiffs asserted that the trial court's findings of fact were clearly erroneous. (App. 32-39).

On May 10, 1984, Acipco filed three motions to alter or amend the judgment, pursuant to Rule 59(e), Fed.R.Civ.P., asserting that plaintiffs Morgan, Self and Williams were not discriminated against and were not entitled to an award of back pay. (App. 40-51). On that same day, Acipco filed a fourth motion, pursuant to Rule 59(e), asserting that the other 18 plaintiffs were not entitled to attorney's fees, expenses and costs because they were not "prevailing parties" within the meaning of 42 U.S.C. § 2000e-5(k) or Rule 54(d), Fed.R.Civ.P.:

> Comes now the defendant, American Cast Iron Pipe Company, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves this Honorable Court for an order altering or amending its judgment of April 30, 1984 in that said judgment awards [the 18 nonprevailing plaintiffs] their attorney's fees and costs. As grounds therefor, the defendant states unto the Court that the foregoing named individuals are not prevailing parties within the meaning of Rule 54(d) of the Federal Rules of Civil Procedure nor are they prevailing parties within the meaning

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Golightly, pursuant to Rule 41(b), Fed.R.Civ.P., and certified its order as a final judgment pursuant to Rule 54(b), Fed.R.Civ.P. These two plaintiffs did not appeal.

> of the attorney's fees provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Therefore, the Court's award of attorney's fees and costs is erroneous and contrary to law. . . . (App. 52-54).[2]

On May 21, 1984, the district court denied the post-trial motions filed on behalf of the 18 nonprevailing plaintiffs and certified its order as a final judgment pursuant to Rule 54(b), Fed.R.Civ.P. (App. 55-56). Contrary to the statement in the opinion of the court of appeals, the Rule 59 motion filed by the three prevailing plaintiffs was *not* ruled upon at that time. (*Compare* App. 3 *with* App. 55-56).

On June 7, 1984, all 21 plaintiffs filed a Notice of Appeal, stating as follows:

> Comes now the plaintiffs, by and through the undersigned counsel, who gives notice of appeal from the Order dated April 30, 1984 and May 21, 1984 to the United States Court of Appeals for the Eleventh Circuit. (App. 57).

This appeal was docketed in the court of appeals as No. 84-7382, the subject of Acipco's motion to dismiss for lack of jurisdiction.

On June 14, 1984, the district court denied all other post-trial motions filed by the plaintiffs and Acipco. (App. 58-59). On July 3, 1984, the three prevailing plaintiffs, but not the 18 nonprevailing plaintiffs, filed another Notice of Appeal, stating as follows:

> Comes now the plaintiffs, Rebecca Self, Brenda Morgan and Karen Williams, by and through the undersigned counsel, who give notice of appeal from the Final Judgment entered April 30, 1984 and from the Order dated June 14, 1984 to the United States Court of Appeals for the Eleventh Circuit. (App. 60).

This second appeal filed by the three prevailing plaintiffs was docketed in the court of appeals as No. 84-7462, and was consolidated with Acipco's appeal challenging the award of at-

[2]At the conclusion of this motion, as a separate and independent ground for altering or amending the judgment, Acipco sought attorney's fees and costs from the 18 nonprevailing plaintiffs. (App. 53).

torney's fees, expenses and costs to the 18 nonprevailing plaintiffs.

On March 26, 1986, the court below rendered its decision in this case. *Cox v. American Cast Iron Pipe Company*, 784 F.2d 1546 (11th Cir. 1986) (App. 1-28). With respect to the jurisdictional issue, which was referred to as a "substantial" question, the court held that it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs, No. 84-7382. (App. 2 & 6). The court reasoned that because Acipco's motion requesting that "attorney's fees and costs be assessed against the 18 losing plaintiffs" was "not a motion to alter or amend a judgment under Rule 59," the 18 nonprevailing plaintiffs were not required to file a new notice of appeal after the district court ruled on Acipco's motion. (App. 3-6). In addition to mischaracterizing this particular motion filed by Acipco, the court below also failed to address the fact that, when the 18 nonprevailing plaintiffs filed their notice of appeal on June 7, 1984, there were five other Rule 59 motions pending before the trial court, four filed by Acipco and one filed by the three prevailing plaintiffs.

The court below also held that the district court abused its discretion in decertifying the class, and that the district court applied incorrect principles of law to the claims asserted by the 18 nonprevailing plaintiffs. (App. 9-26). Accordingly, the court of appeals reversed the decertification order, as well as the judgments entered against the 18 nonprevailing plaintiffs, and remanded the case "for retrial as a pattern and practice class action." (App. 2). In addition, the court vacated the awards entered in favor of the three prevailing plaintiffs and remanded them to the district court for separate consideration, recalculation of back pay, and the entry of appropriate injunctive relief. (App. 26-28). Acipco's appeal challenging the award of attorney's fees, expenses and costs to the 18 nonprevailing plaintiffs was not considered by the court below since this award too was vacated, pending "appropriate adjustment after remand." (App. 26).

Acipco timely filed a petition for rehearing *en banc*, which

was denied without opinion on May 5, 1986. (App. 31). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The court below held that it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs, even though there were five motions to alter or amend the judgment pending before the district court at the time their notice of appeal was filed, and the 18 nonprevailing plaintiffs did not file a second notice of appeal subsequent to the district court's ruling on these five post-trial motions. In so holding, the Eleventh Circuit rendered a decision on an important question of federal law in total disregard of Rule 4(a)(4) of the Federal Rules of Appellate Procedure; in direct conflict with applicable decisions of this Court; and in direct conflict with applicable decisions of every other federal court of appeals. Furthermore, by totally disregarding the actual procedural posture of the case reflected in the record before it, the court below so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. In short, the issue in this case, which even the court below characterized as "substantial," warrants review because of its importance to sound, impartial, and uniform judicial administration in the courts of the United States. For all these reasons, the writ should be granted. Sup. Ct. Rule 17.

I. The Court Below Rendered A Decision In Total Disregard Of Rule 4(a)(4) Of The Federal Rules Of Appellate Procedure, In Direct Conflict With Applicable Decisions Of This Court, And In Direct Conflict With Applicable Decisions Of Every Other Federal Court Of Appeals.

28 U.S.C. § 1291 vests the courts of appeals "with jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." This Court has held that a "final decision" is "one which ends the litigation on the merits and

leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945). The policy underlying this statute is that restricting appellate review to "final decisions" prevents the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170 (1974). *See also Cobbledick v. United States,* 309 U.S. 323, 324-25 (1940) ("Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration").

Rule 4(a) (4) of the Federal Rules of Appellate Procedure also reflects the wise policy against piecemeal litigation. Rule 4(a) (4) specifies several post-trial motions, including those filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend a judgment, which must be disposed of before an effective notice of appeal can be filed. The rule provides that when a Rule 59 motion "is filed in the district court by *any* party . . . the time for appeal for *all* parties *shall* run from the entry of the order denying a new trial or granting or denying any other such motion" specified in Rule 4(a) (4). (emphasis added). In addition, the rule provides that "[a] notice of appeal filed before the disposition of any of the above motions *shall have no effect.* A new notice of appeal *must* be filed within the prescribed time measured from the entry of the order disposing of the motion." (emphasis added). Of course, the requirement of a timely notice of appeal is both "mandatory and jurisdictional." *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 257, 264 (1978). *See also United States v. Robinson,* 361 U.S. 220, 229 (1960); *Matton Steamboat Co. v. Murphy,* 319 U.S. 412, 415 (1943).

Under the plain language of Rule 4(a) (4), a notice of appeal filed before the disposition of any and all Rule 59(e) motions "shall have no effect," and a new notice of appeal "must be filed." As the Advisory Committee on the appellate rules has recognized, the very purpose of Rule 4(a) (4) is to

"make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motions." This is so because "it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from." Advisory Committee Note to 1979 Amendment to Rule 4, Fed.R.App.P. *See also F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago,* 739 F.2d 284, 284-85 (7th Cir. 1984) ("Appeal is premature until the district court has rendered a genuinely final and complete decision by disposing of all motions that the Federal Rules allow the parties to make within 10 days of the rendition of the judgment and that when made toll the time for appealing").

In this case, however, the court below totally disregarded the plain language and purpose of the rule. The court held that it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs, even though there were five motions to alter or amend the judgment pending before the district court at the time their notice of appeal was filed, and the 18 nonprevailing plaintiffs did not file a second notice of appeal subsequent to the district court's ruling on these five posttrial motions. The court below, in considering the premature appeal filed by the 18 nonprevailing plaintiffs, has, quite clearly, disregarded Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and exceeded its appellate authority granted it by Congress pursuant to the Constitution of the United States. Accordingly, because the Eleventh Circuit's decision in this case is fundamentally at odds with Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and the purpose underlying the rule, the Court should issue the writ.

The writ should also be issued because the decision by the court below is in direct conflict with this Court's decisions in *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982), and *Acosta v. Louisiana Dept. of Health and Human Resources,* ____ U.S. ____, 54 U.S.L.W. 3856 (1986), and in direct conflict with applicable decisions of every other federal

court of appeals. In *Griggs*, a case involving the interpretation of Rule 4(a)(4), the Court held that a court of appeals cannot waive the defect of prematurity of a notice of appeal filed before the entry of an order disposing of the motions specified in Rule 4(a)(4). A premature notice of appeal, the Court wrote, is a "nullity," and "it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61. *See also Acosta*, 54 U.S.L.W. at 3856 (Under Rule 4(a)(4), "a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies").

In addition to being in direct conflict with *Griggs* and *Acosta*, the decision by the Eleventh Circuit is also in direct conflict with its own decisions and applicable decisions of every other circuit. Every circuit has squarely held that a notice of appeal filed before disposition of the specified post-trial motions is null, void, and of no effect.[3] In short, because the decision by the court below is legally incorrect; conflicts with the decisions of this Court in *Griggs* and *Acosta*, and with decisions of every other court of appeals; and is contrary to the plain language and purpose of Rule 4(a)(4) of the Federal Rules of Appellate Procedure, the Court should issue the writ. *See generally Griggs*, 459 U.S. at 58 (certiorari granted "[b]ecause this analysis [by the Third Circuit] of Rule 4(a)(4) conflicts with the decisions of other Courts of Appeals and is

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[3]*Sine v. Local No. 992, Int'l Bhd. of Teamsters*, 790 F.2d 1095, 1096-97 (4th Cir. 1986); *Muhammad v. DeRoberts*, 788 F.2d 1268, 1269 (7th Cir. 1986); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102-03 (6th Cir. 1985); *Greater Houston Chapter of ACLU v. Eckels*, 755 F.2d 426, 427-28 (5th Cir. 1985); *United States v. Rogers Transp., Inc.*, 751 F.2d 635 (3d Cir. 1985); *Bestran Corp. v. Eagle Comtronics, Inc.*, 720 F.2d 1019 (9th Cir. 1983); *Berrios v. Hernandez Agosto*, 716 F.2d 85, 86 (1st Cir. 1983); *Scott v. Wainwright*, 698 F.2d 427, 428 (11th Cir. 1983); *American Sec. Bank v. John Y. Harrison Realty, Inc.*, 670 F.2d 317, 320-21 (D.C. Cir. 1982); *A. O. Smith Corp. v. Sims Consolidated, Ltd.*, 647 F.2d 118, 120 (10th Cir. 1981); *Keith v. Newcourt, Inc.*, 530 F.2d 826 (8th Cir. 1976); *Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307, 316-18 (2d Cir. 1970).

contrary to the language and purpose of the 1979 amendment to the Federal Rules of Appellate Procedure") .[4]

II. The Court Below So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Power Of Supervision.

In its opinion, the court below recited the facts it deemed relevant to the question of whether it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs. (App. 1-4) . Many of the facts stated by the court, however, are inaccurate, and the court totally ignored the dispositive facts contained in the record before it. Petitioner does not ask the Court to grant the writ merely because the court below erroneously found the facts, but rather because the court so departed from the accepted and usual course of judicial pro-

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[4]The fact that the order denying the 18 nonprevailing plaintiffs' Rule 59 motion was certified as a final judgment under Rule 54 (b) , Fed.R. Civ.P., does not alter the conclusion that the court below did not have jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs. This is so because an order is appealable under Rule 54 (b) only if the claims designated in the order lack a substantial factual overlap with those remaining in the district court, and multiple appellate consideration of the same or similar facts and issues would not be required. *See, e.g., Jack Walters & Sons Corp. v. Morton Bldg., Inc.,* 737 F.2d 698, 702 (7th Cir.) , *cert. denied,* _____ U.S. _____, 105 S.Ct. 432 (1984) ; *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.,* 463 F.2d 101, 103 (2d Cir.) , *cert. denied,* 409 U.S. 1040 (1972) . As the Third Circuit held in *Behring Int'l, Inc. v. Imperial Iranian Air Force,* 699 F.2d 657 (3d Cir.) , *reh'g denied,* 712 F.2d 45 (3d Cir. 1983) :

> [A] party may not appeal from a decision certified pursuant to Fed.R.Civ.P. 54 (b) while the district court is considering a Fed.R. Civ.P. 59 motion filed by the opposing party if the appeal and the Rule 59 motion raise identical or *closely related legal issues in the same factual context.* To hold otherwise would allow an appeal under circumstances which would constitute simultaneous exercise of original and appellate jurisdiction over identical or *related subject matter* in violation of the explicit dictates of *Griggs.*

712 F.2d at 47-48 (emphasis added) . Contrary to the respondents' contention, Rule 54 (b) would still have full play in post-trial proceedings, except in the situation here, as described in *Behring, supra.*

ceedings as to call for the exercise of this Court's power of supervision.

In its opinion, the court below stated that on May 21, 1984, the district court denied *all* of the Rule 59 motions filed by the plaintiffs. (App. 3). In fact, the district court's order of May 21, 1984 did not dispose of all of plaintiffs' Rule 59 motions, but rather only the post-trial motion filed by the 18 nonprevailing plaintiffs; the Rule 59 motion filed by the three prevailing plaintiffs was not ruled upon until June 14, 1984, after the 18 nonprevailing plaintiffs filed their notice of appeal. (*Compare* App. 3 *with* App. 55-59). In addition, the court below also failed to address the fact that, when the 18 nonprevailing plaintiffs filed their notice of appeal on June 7, 1984, there were *five* other Rule 59 motions pending before the district court, four filed by Acipco and one filed by the three prevailing plaintiffs. (App. 32-57). Nevertheless, the court concluded it had jurisdiction because Acipco's motion requesting that "attorney's fees and costs be assessed against the 18 losing plaintiffs" was "not a motion to alter or amend a judgment under Rule 59," and, therefore, the 18 nonprevailing plaintiffs were not required to file a new notice of appeal after the district court ruled on Acipco's motion. (App. 3-6). It was only through the process of distorting and omitting what appeared on the face of the record before it that the court below could conceivably hold, and did so hold, that it had jurisdiction to consider the appeal filed by the 18 nonprevailing plaintiffs. Such a process seriously undermines the integrity of the courts of the United States.

Every federal court of appeals, including the Eleventh Circuit, but not in this case, has held that "[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label." 9 Moore's Federal Practice ¶ 204.12[1] at 4-67 & 4-69 (1985). *See also United States v. Eastern Air Lines, Inc.*, ____ F.2d ____, No. 85-5808, slip op. 4213, 4216 (11th Cir. July 9, 1986) ("All a Rule 59 motion need do is request relief that may be

granted").[5] In this case, the district court entered a judgment in favor of Acipco with respect to the claims asserted by the 18 nonprevailing plaintiffs, but awarded attorney's fees, expenses and costs to those plaintiffs, finding they were "prevailing parties" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Rule 54(d), Fed. R.Civ.P. (App. 3). Acipco's Rule 59 motion regarding the 18 nonprevailing plaintiffs attacked the *finding* and *judgment* that they were "prevailing parties," *in the face of a judgment in Acipco's favor.* In other words, the motion was directed *not* to the issue of the *amount* of attorney's fees to be awarded, but rather whether the *judgment* awarding fees was proper. (App. 52-54). As such, it was clearly a Rule 59 motion because it was a motion that drew into question "the correctness of a judgment." Moore's Federal Practice, *supra.* Hence, because the determination of who is a "prevailing party" is of necessity integrally entwined with the decision on the merits, Acipco's motion was directed to an integral part of the merits of the case, not a collateral matter such as the amount of attorney's fees to be awarded. *Compare Acosta, supra* (motion attacking "an award of attorney's fees" was "a timely motion to alter or amend the judgment, as authorized by Federal Rule of Civil Procedure 59(e)") *with White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982) (a request for fees under Title VII is a collateral matter).[6]

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[5]*Quartana v. Utterback*, 789 F.2d 1297, 1299 (8th Cir. 1986); *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir. 1986) (*en banc*); *Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir. 1985); *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984); *Western Industries, Inc. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983); *Cosgrove v. Smith*, 697 F.2d 1125, 1127-28 (D.C. Cir. 1983); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982); *Miller v. Leavenworth-Jefferson Elec. Coop.*, 653 F.2d 1378, 1380 (10th Cir. 1981); *Smith v. Hudson*, 600 F.2d 60 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979); *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978); *Ranch Ass'n v. California Coastal Zone Conservation Comm'ns*, 537 F.2d 1058, 1061 (9th Cir. 1976); *Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961), *rev'd on other grounds*, 371 U.S. 178 (1962).

[6]Of course, under *White, supra*, that portion of Acipco's motion *requesting* fees was collateral to the action, and, therefore, was not a motion

In addition to misapprehending the nature of Acipco's motion to alter and amend that portion of the judgment awarding attorney's fees to the 18 nonprevailing plaintiffs, the court below also either overlooked or ignored the fact that there were four other Rule 59(e) motions pending before the district court at the time the 18 nonprevailing plaintiffs filed their notice of appeal. The court's decision does not even mention this fact, much less analyze the effect of the pendency of those motions on the "substantial" jurisdictional issue before it. (App. 1-28). Furthermore, the jurisdictional issue was squarely raised in Acipco's petition for rehearing, which was summarily denied without opinion on May 5, 1986. (App. 31). Thus, no matter how viewed, the decision by the court below conflicts irreconcilably with Rule 4(a)(4), Fed.R.App.P., and this Court's decisions in *Griggs* and *Acosta, supra.*

In summary, the Eleventh Circuit's decision is completely at odds with the controlling legal principles. The cause of equality in the workplace and respect for our system of justice is not well served by the disregard of due legal procedures and the incorrect application of settled legal principles. The ultimate responsibility for the proper functioning of the federal judiciary rests squarely on this Court. The not infrequent grant of certiorari in cases involving federal jurisdiction, practice and procedure reflects the Court's awareness of its responsibility.[7] The writ should be granted in this case because the question presented is of fundamental importance to sound, impartial and uniform administration of justice in the courts of the United States.

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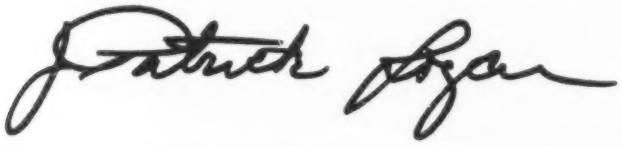
to alter or amend the judgment within the meaning of Rule 59, Fed.R. Civ.P.

[7]*See, e.g., Acosta v. Louisiana Dept. of Health and Human Resources,* 54 U.S.L.W. 3856 (1986); *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982); *White v. New Hampshire Dept. of Empl. Sec.,* 455 U.S. 445 (1982); *Thermatron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976); *Zahn v. International Paper Co.,* 414 U.S. 291 (1973); *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968); *Hanna v. Plumer,* 380 U.S. 460 (1965); *Schlagenhauf v. Holder,* 379 U.S. 104 (1964); *United States v. Robinson,* 361 U.S. 220 (1960); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947); *Hickman v. Taylor,* 329 U.S. 495 (1947)); *Cobbledick v. United States,* 309 U.S. 323 (1940).

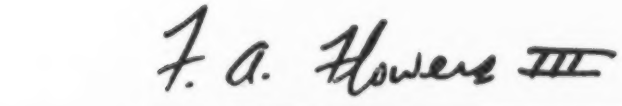
CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, summarily reverse the judgment of the court of appeals, and remand the case with directions to dismiss the appeal filed by the 18 nonprevailing plaintiffs.

Respectfully submitted,



J. Patrick Logan



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PROOF OF SERVICE

I, F. A. Flowers, III, a member of the Bar of this Court, as counsel of record for petitioner herein, American Cast Iron Pipe Company, hereby certify that three copies of the above and foregoing Petition for a Writ of Certiorari have been served by United States mail, properly addressed and first-class postage prepaid, on this the 1st day of August, 1986, upon counsel for respondents, Robert L. Wiggins, Jr., Esq., Gordon, Silberman, Wiggins & Childs, 1500 Colonial Bank Building, Birmingham, Alabama 35203, and J. Scott Vowell, Esq., Beddow, Fullan & Vowell, 900 Massey Building, Birmingham, Alabama 35203.

It is also certified that all parties required to be served have been served.

F. A. Flowers, III

Sworn to and subscribed before me
on this 1st day of August, 1986.

Notary Public

APPENDIX

Annette COX, et al.,
Plaintiffs-Appellants,

v.

AMERICAN CAST IRON PIPE COMPANY, a corporation,
Defendant-Appellee.

Annette COX, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

AMERICAN CAST IRON PIPE COMPANY, a corporation,
Defendant-Appellee,
Cross-Appellant.

Nos. 84-7382, 84-7462.

United States Court of Appeals,
Eleventh Circuit.

March 26, 1986.

Female employees brought sex discrimination action against employer. The United States District Court for the Northern District of Alabama, William M. Acker, Jr., J., 585 F.Supp. 1143, decertified class, entered judgment in favor of three employees, but ruled against 18 employees, and appeals were taken. The Court of Appeals, Johnson, Circuit Judge, held that: (1) Court had jurisdiction over appeals; (2) District Court erred in decertifying class action; (3) District Court applied improper burden of proof; (4) employees were not required to show that they had in fact applied for jobs or promotions to recover; (5) District Court should not have dismissed certain claims as noncognizable "comparable worth" claims; and (6) District Court erred in fashioning back pay awards for prevailing employees.

Reversed in part, vacated in part, and remanded.

Appeals from the United States District Court for the Northern District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This is a "pattern and practice" sex discrimination suit brought by a class of women employed at the American Cast Iron Pipe Company (ACIPCO) in Birmingham, Alabama, under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq*. During the decade in which these proceedings were heard by the district court under a succession of judges, the original class was decertified and judgment was ultimately entered in favor of only three of the individual claimants.

We conclude from our examination of these proceedings that the class decertification was improper and that numerous errors infect the district court's decisions in the individual cases. Accordingly, we REVERSE the decertification order and the judgments against the 18 losing plaintiffs, and we REMAND this case for retrial as a pattern and practice class action. Further, we VACATE the awards in favor of the three winning plaintiffs, and REMAND them for recalculation consistent with this opinion.

I. Jurisdiction in No. 84-7382.

Differing judgments for the two groups of plaintiffs involved in this Title VII sex discrimination suit have given rise to two separate appeals. The action styled No. 84-7382, which concerns the 18 plaintiffs who received unfavorable judgments in the lower court, raises a substantial jurisdictional question.[1] We turn first to that question, and then to the merits of each claim.

[1]There is no dispute concerning jurisdiction in No. 84-7462.

The facts relevant to our exercise of jurisdiction are as follows. On April 30, 1984, 585 F.Supp. 1143 (N.D.Ala.), the district court entered judgment in favor of three and against 18 of the 21 plaintiffs in the Title VII suit that gives rise to these actions. However, the court granted the 18 losing plaintiffs attorney's fees and costs as "prevailing parties," reasoning that their suit was a catalyst for change in the treatment of women at ACIPCO.

A number of Fed.R.Civ.P. 59 motions to alter or amend the judgment followed this order. Four of these motions were made on April 10, 1984, by the defendant, ACIPCO. Of these four, three concerned the judgment in favor of the winning parties, Morgan, Self and Williams. The fourth, which we consider here, was a request that attorney's fees and costs be assessed against the 18 losing plaintiffs. Plaintiffs also made several Rule 59 motions.

On May 21, 1984, the lower court denied all the plaintiffs' motions but left the four Rule 59 motions raised by the defendant pending, including the motion for attorney's fees and costs filed against the 18 losing plaintiffs. By the same order, the court, finding no just cause for delay, directed the entry of final judgment under Fed.R.Civ.P. 54(b) against the latter plaintiffs.

Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed.R.Civ.P. 54(b). This judgment must be appealed within 30 days. The 18 plaintiffs filed a notice of appeal within that period, on June 7, 1984.

However, when these parties filed their notice of appeal, defendant's Rule 59 motion for attorney's fees was still pending — it was not decided, in fact, until June 14, 1984. Fed.R.Civ.P. 4(a)(4) prohibits appeal when Rule 59 motions are pending. It provides in relevant part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.* [Emphasis added.]

The 18 plaintiffs filed no new notice of appeal after the Rule 59 motions were decided. (The three prevailing plaintiffs, who had received no Rule 54[b] judgment, did so.)

Under the plain language of Rule 4(a)(4), the 18 plaintiffs' June 7, 1984, notice of appeal would appear to have no effect. The Supreme Court in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982), held that a notice of appeal filed while a Rule 59 motion was pending, is "not merely defective; it [is] a nullity" — or, as "Professor Moore . . . aptly described the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal: 'The appeal simply self-destructs.'" This Circuit has several times made similar observations. *See Gibbs v. Maxwell House, Div. of General Foods Corp.*, 701 F.2d 145, 146 (11th Cir. 1983); *Scott v. Wainwright*, 698 F.2d 427, 428 (11th Cir. 1983); *United States v. Valdosta-Lowndes County Hospital Authority*, 668 F.2d 1177, 1178 (11th Cir. 1982).

However, the Advisory Committee Notes to Rule 4(a)(4) indicate that "it would be undesirable to proceed with the appeal while the district court has before it a motion *the granting of which would vacate or alter the judgment appealed from.*" Fed.R.App.P. 4(a)(4) Advisory Committee Note (emphasis added). This Court must decide whether or not a Rule 59 motion for attorney's fees is such a motion — or, put differently, whether a motion for attorney's fees under Title VII is properly styled a Rule 59 motion.

We hold that a motion for attorney's fees in a Title VII action is not a motion to alter or amend a judgment under Rule 59. Our ruling parallels that of this Court in *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir. 1984) (securities fraud class action), in which we said:

> A motion respecting costs is not a motion to alter or amend a judgment under Rule 59. Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits. A motion for costs does not seek reconsideration of substantive issues resolved in the judgment, but relates exclusively to the collateral question of what is due because of the judgment.

Title VII on its face treats attorney's fees as costs. "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C.A. § 2000e-5(k). The former Fifth Circuit found a similar statutory provision persuasive in considering whether a motion for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988, was a motion to alter or amend a judgment under Rule 59(e). In *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980), that Court said:

> In this case, attorneys fees are by statute part of the costs. Because they may be awarded only to prevailing parties, and in the discretion of the district court guided by the *Johnson* factors, attorney's fees will ordinarily be sought only after litigation. [Citation omitted.] Thus, a motion for attorney's fees is unlike a motion to alter or amend a judgment.

See also White v. New Hampshire Dept. of Empl. Sec., 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (a postjudgment request for an award of attorney's fees under § 1988 was not a "motion to alter or amend the judgment" subject to the timeliness standard of Rule 59[e]). This reasoning logically extends to a motion for attorney's fees under Title VII. *Cf. Gordon v. Heimann*, 715 F.2d 531, 536-37 (11th Cir. 1983) (Rule 59 request for attorney's fees in RICO case was "collateral to the main action").

Our ruling is, furthermore, consistent with the district court's Local Rule 11 which provides that the question of attorney's fees "does not extend the time for appealing from . . . the judgment [including a Rule 54(b) judgment] giving rise to the claim for attorney's fees. . . ." N.D. Ala. Local Rule 11 (1982).

In sum, "[t]hough [defendant] styled its motion a Rule 59 . . . motion, 'nomenclature is not controlling.' " *Lucas,* 729 F.2d at 1302, quoting *Miller v. Transamerican Press, Inc.,* 709 F.2d 524, 527 (9th Cir. 1983). Our exercise of jurisdiction is appropriate in action No. 84-7382.

II. The Class Action

A. Facts and procedural history.

We turn now to the merits of the Title VII "pattern and practice" (i.e., class disparate treatment) sex discrimination suit before us. The named plaintiffs, Annette Cox, Brenda Morgan and Joyce Pandellis (nee Mitchell), filed this suit for both injunctive and individual monetary relief in the Northern District of Alabama on May 15, 1974, after the EEOC found probable cause to believe that the American Cast Iron Pipe Company (ACIPCO) discriminated on the basis of sex, and after an attempt at conciliation failed. The EEOC findings included, *inter alia,* the following:

> Documentary evidence reveals that Respondent's salary non-exempt workforce has three job classifications with both male and female incumbents. Analysis of the record further reveals that female employees are paid lower wages than males in each of three job functions employing both males and females. The evidence of record further reveals that female employees had more experience and longevity than males, yet received lower wages.
>
> The Commission concludes that there is reasonable cause to believe that this allegation is true.
>
> * * * * * *
>
> Respondent's records reveal that the salary non-exempt work force is composed of 105 females and 73 males. The

workforce is divided into 49 job classifications. Three of these classifications employ both male and female incumbents. These three classifications employ 6 (5%), of Respondent's female employees and 8 (11%), of Respondent's male employees. The remaining 99 females are assigned to 19 exclusively female positions and the remaining 65 males are assigned to 27 exclusively male positions.

The Commission concludes that there is reasonable cause to believe that Respondent Employer discriminates against females as a class by failing to promote them and by maintaining segregated job classifications on the basis of sex.

In the action before us it is undisputed that the defendant had a policy of overt workforce sex segregation. Before December 1973 ACIPCO deliberately reserved clerical jobs in its all-male production plant for men. The non-plant clerical jobs paid less than the plant clerical jobs. Only after this suit was filed did defendant allow a few women to make their way into the plant. Outside the plant, women were also kept on the lowest levels of the workforce and paid the least.

The defendant maintained this discriminatory system through word of mouth hiring. There was no posting or announcing of vacancies in salaried jobs. There were also no bid systems or formal applications for these jobs, and no written criteria for selection – the system was entirely one of subjective evaluation. Hourly job openings were sometimes posted, but only in the plant where women, of course, could not see them. In short, sex discrimination at ACIPCO was pervasive and overt.

Plaintiffs' complaint alleges incidents of discrimination in hiring, assignment, transfer, compensation, promotion, fringe benefits, maternity leave, sick leave, pregnancy benefits and sexual harassment. It also charges ACIPCO with maintaining sex-segregated job classifications and paying unequal compensation for equivalent work.

The procedural history of this suit is complex. Three district judges handled this case over the course of its more than

ten-year history. The first judge heard evidence sufficient for him to certify a 23(b)(2) class in December 1981 including all past, present and future female employees of defendant affected by its advancement, training and compensation policies. This was a so-called hybrid 23(b)(2) class action since the plaintiffs sought both back pay and injunctive relief, as well as attorney's fees and costs. In his December 23, 1981, memorandum opinion, the lower court found that the named plaintiffs in this case, Cox and Morgan (Ms. Pandellis did not remain as a named plaintiff), had compensation and advancement, and compensation, advancement and training claims, respectively. The trial judge further found a "statistically significant correlation between sex, salary and position [at ACIPCO]. Defendant pays men more than women at every level and men hold more responsible higher paying jobs."

Two weeks after this class of some 240 plaintiffs was certified, the first judge resigned from the bench and a second judge assumed responsibility for the case. Defendant moved to decertify the class. In a June 7, 1982, order, the judge refused to grant defendant's decertification motion, but he did authorize defendants to issue a notice of a right to opt out of the 23(b)(2) class action. He wrote:

> If, as defendant insists, the proposed class lacks numerosity or the members' claims are typical[2] of, or antagonistic to, the interests of the other employees, then the response to the notice should so indicate, and, if it deems appropriate, the court can then reconsider class certification.

Shortly thereafter, a third judge took over the case and approved the opt-out procedure. Two hundred thirty-two notices were mailed to class members. About half of the potential plaintiffs opted out after receiving the notice, leaving some 117 in the class.

In March 1983, the district court granted defendant's motion to serve interrogatories on the remaining members of the class.

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[2]This part of the order is ambiguous at best; the district judge perhaps intended "atypical."

Only sóme 47 answered these interrogatories. The judge thereupon dismissed the claims of the other class members under Fed.R.Civ.P. 37, which permits dismissal as a sanction for failure to respond to discovery. Based on this class-member attrition, plaintiffs' answers to interrogatories, and his reading of the Supreme Court's *General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), decision, the trial judge then decertified the class on September 27, 1983. Twenty-three plaintiffs still sought review of their individual claims. The district court dismissed two cases and tried the remaining claims beginning on December 12, 1983. These trials ended on March 22, 1984.

On April 30, 1984, the district court entered judgment on behalf of three of the plaintiffs — Brenda Morgan, Rebecca Self and Karen Williams — and awarded them back pay of $19,200, $15,000 and $5,200, respectively. The judge declined to issue an injunction against the only other Title VII violation he found, "related to ACIPCO's previous, now withered, policy of reserving plant clerical jobs for men." As to the 18 other plaintiffs, he found in favor of ACIPCO.

The trial judge found that all the plaintiffs were prevailing parties "in the sense that their suits resulted in what might be called an 'attitude adjustment' at ACIPCO and in opening up plant jobs, an event which might not have taken place as soon or as dramatically if this suit had not been filed." On this ground the judge awarded all the plaintiffs attorney's fees and costs.

B. Class decertification

We now examine the district court's use of opt-out and discovery procedures to decertify the class in this case. We conclude that the decertification itself and the procedures used to arrive at it constituted a clear abuse of discretion.

The district court entered a decertification order on its finding that the class did not satisfy the numerosity and commonality requirements of Fed.R.Civ.P. 23(a). Questions concern-

ing class certification are left to the sound discretion of the district court. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1347 (11th Cir. 1983). Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation. *Falcon*, 457 U.S. at 160, 102 S.Ct. at 2372 (1982).

The district court abused its discretion in decertifying the class on both numerosity and commonality grounds. We turn first to the issue of numerosity.

1. Numerosity.

The district court countenanced the use of opt-out and discovery sanction procedures to reduce the class from some 240 to 47 members. We note that the trial court's decertification of the 47-member class for lack of numerosity was by no means compelled by Rule 23 or the case law. As the trial judge who originally certified the class pointed out, citing 3B Moore's Federal Practice ¶ 23.05[1] at n. 7 (1978), while there is no fixed numerosity rule, "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors."

However, since we determine here that the trial court improperly allowed the numerosity of the class to be whittled down from 240 to 47, we need not decide this issue based on the smaller figure. Class numbers were reduced in two steps: (1) the court authorized and the defendant distributed a mistimed and coercive opt-out notice to class members and, (2) thereafter, the court authorized and the defendant executed discovery requests on the remaining 117 passive class members that amounted to improper opt-in procedures. We will examine each of these steps in turn.

a. The opt-out notice.

The opt-out notice written by the defendant and sent to each class member included the following:

> ¶ 3. Since a significant number of female salaried employees of the Company testified in open court in this case

> that they did not believe that they had been discriminated against on the basis of their sex by the Company, the Court has approved the distribution of this notice. Pursuant to this notice, you have the right to either participate in this case as a plaintiff class member or to 'opt out' and not participate.
>
> ¶ 5. . . . If you take no action you remain a member of the class, you will continue to claim sex discrimination by the company, and you will be legally bound by any future orders of this Court with respect to this case. You may be called as a witness by either plaintiffs or the Company, and may be required to answer interrogatories . . . or appear for your deposition. . . . Failure to comply with this Court's orders could result in your claim being dismissed, or could subject you to contempt proceedings.

Roughly one-half of the original class opted out after receiving this notice.

A district court, acting under its Rule 23(d)(2) discretionary power, may require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. Unit B 1981). Such a decision may be reversed only for abuse of discretion. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983). Appellee urges that the opt-out notice authorized here was entirely appropriate to protect the rights of passive class members.

We disagree. Appellee's argument misconstrues the parameters of the court's discretion to permit an opt-out in a hybrid class proceeding. A hybrid Rule 23(b)(2) class action is one in which class members seek individual monetary relief, typically back pay, in addition to class-wide injunctive or declaratory relief. *Penson,* 634 F.2d at 994. The general rule in this Circuit is that absent members of (b)(2) classes have no automatic right to opt out of a lawsuit and to prosecute an entirely separate action. *Holmes,* 706 F.2d at 1153. But the hybrid form changes that rule slightly. "The *Penson* and *Pettway* [*v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974)]

decisions represent an acknowledgement that *the monetary relief stage* of a Title VII case often 'begins to resemble a 23 (b) (3) action' and that courts have shown increasing 'concern for providing for the due process rights of individual class members.'" *Id.* at 1154 (citation omitted) (emphasis added). Thus, under the hybrid theory, "absent class members [must] be given an opportunity to opt out of the class at *the monetary relief stage* of a Title VII lawsuit or settlement," *Id.* at 1155 (emphasis added).

Here, however, the trial court authorized an opt-out at the certification stage of the suit. This has not been the practice of our courts. See *Holmes, id.*; *Penson*, 634 F.2d 989; *Fowler v. Birmingham News*, 608 F.2d 1055 (5th Cir. 1979); *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978) (opt-outs all permitted at monetary relief stage of suit). Indeed, the concerns that mandate opt-out procedures at stage two of a hybrid Title VII suit are not present at certification, where there is as yet no danger that individual class members may be bound against their interests by a money judgment or settlement. What is to be tried in stage one is simply the issue of liability — in this case, the question of whether the defendant actually had a policy of discriminating against women. By releasing some class members from the suit at this stage, a trial judge would invite the repeated litigation of the pattern and practice issue, with lamentable consequences for judicial economy and the finality and consistency of judgments.

To the extent that class members may wish to assert that no such pattern and practice of sex discrimination exists, of course, they may testify to that effect, or decline to present any claims at a stage two proceeding. But Rule 23 jurisprudence has never contemplated a right actually to opt out of a stage one suit for such a reason, or indeed for any reason other than for class members to pursue individual discrimination claims separately. Indications of non-interest in a suit are simply "inappropriate," as the district judge who certified the class originally observed, "at a class determination hearing." "[T]he fact that some class members might like the status quo will not defeat a claim on

behalf of the class." *Bucha v. Illinois High School Association*, 351 F.Supp. 69, 72 (N.D. Ill. 1972).

Thus, we clarify our approval of certain opt-out procedures in *Penson* and *Holmes* by holding today that an opt-out is nevertheless inappropriate before the monetary relief stage of a hybrid Rule 23(b)(2) class action brought under Title VII. Such a procedure would only tend to promote what was actually accomplished here — the improper use of a court-approved opt-out procedure designed to force class members to take a stand against their employers in order to stay in a controversial lawsuit. To authorize such a procedure was abuse of discretion.

Furthermore, we find that the content of this particular opt-out notice was clearly improper. Whether or not appellants failed to object to the notice before it was sent, as appellee alleges, we are satisfied that the trial court's authorization of such a notice itself constituted an abuse of discretion.

The notice was objectionable on three grounds. First, the reference in paragraph three, *supra*, to the assertions of some women that ACIPCO did not discriminate could be construed to refer to a pre-certification "poll" taken earlier by the defendant in which women were asked by supervisory personnel or senior employees whether they felt that they were discriminated against. The district judge who originally certified the class said that this poll was "strongly disapproved of," noting that "the pollsters demanded a signature and, when the employee refused to answer or answered yes, demanded an explanation. Notes of the fact of refusal or an explanation were made by the pollsters. . . . Several of the pollsters 'explained' that where employees held female-only jobs, there could be no discrimination." In this already coercive atmosphere, no reference in the opt-out notice to the opinions of anyone involved with the lawsuit, however those were solicited, was appropriate or indeed permissible.

Second, the suggestion in paragraph three that the court approved an opt-out notice *because* some women claimed that there was no discrimination appears to put the court's im-

primatur on the sentiment, and on opting out because of it. Several courts have required a cautionary paragraph in opt-out notices to prevent the notice from being viewed as an official validation of a class claim. *See* C. Wright & A. Miller, *Federal Practice and Procedure*, § 1787 (1982) at 162. That reasoning extends as well to an implicit official invalidation of a class claim. In appropriate circumstances a court may extend to class members an opportunity to opt out of a suit; it may not, however, appear to approve or recommend any particular decision on their part. An opt-out notice must be neutrally drafted.

Finally, paragraph five's threat of "contempt proceedings" against class members for failure to comply with court orders, and its warning that members may be called as witnesses or required to answer interrogatories, is particularly objectionable. In our experience, contempt proceedings are rarely if ever brought against passive class members. Further, sanctions are available in any case when a class member refuses to testify even if he or she opts out of the suit. Class members may also be required to answer interrogatories or to testify regardless of whether they remain in the suit. Thus, paragraph five amounts to no more than a string of empty threats, utterly inappropriate to a court-approved opt-out notice.

Taken together, these portions of the first opt-out notice are unduly coercive. To authorize the sending of such a notice was itself an abuse of discretion.

b. Discovery sanctions.

The improper reduction of numbers in this class had a second step, to which we now turn. After the opt-out notice diminished the class to 117 members, the lower court authorized the defendant to send the remaining class members seven pages of interrogatories. These individuals were cautioned that "[f]ailure to answer these interrogatories may result in the dismissal of any claim for damages you may have as a member of the plaintiff class. . . ." Only 47 people completed, notarized and returned the interrogatories. The judge thereupon dismissed the claims of those who did not respond under Fed.R.

Civ.P. 37 (d), which authorizes sanctions for failure to comply with discovery orders.

We cannot countenance so cavalier an imposition of the harshest Rule 37 sanction. The decision to dismiss a claim, like the decision to enter a default judgment, ought to be a last resort — ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders. *Coors v. Movement Against Racism,* 777 F.2d 1538, 1542 (11th Cir. 1985); *Hashemi v. Campaigner Publications,* 737 F.2d 1538 (11th Cir. 1984). On appeal we will find abuse of discretion if lesser sanctions would suffice. *Ford v. Fogarty Van Lines, Inc.,* 780 F.2d 1582, 1583 (11th Cir. 1986). Here, the lower court made no finding of any bad faith resistance to discovery orders and, further, left no indication on the record that it considered and rejected sanctions less severe than dismissal. This was error.

Appellee cites *Brennan v. Midwestern United Life Insurance Co.,* 450 F.2d 999, 1004 (7th Cir. 1971) (securities class action), for the proposition that "absent class members may, under certain circumstances, be required to submit to discovery under Rules 33 and 34 and that the sanctions of Rule 37 are available to compel compliance with such discovery orders."

However, we do not find *Brennan* compelling. It has not met with wide acceptance in this Circuit. *See Wainwright v. Kraftco Corp.,* 54 F.R.D. 532, 534 (N.D. Ga. 1972). Indeed, *Brennan* has not been unswervingly followed in the Seventh Circuit, and it has arguably been narrowed by subsequent rulings. In *Clark v. Universal Builders,* 501 F.2d 324 (7th Cir. 1974), a panel of the Seventh Circuit refused to uphold a lower court's dismissal of class members who failed to respond to interrogatories, finding that the defendants did not meet "the burden of demonstrating the meritorious nature of their request." *Id.* at 340. The *Clark* court sought assurance, *inter alia,* (1) that "the interrogatory [was] not designed 'as a tactic to take undue advantage of the class members or as a strategem to reduce the number of claimants,'" *id.*; (2) that the interrogatory was "necessary," *id.* at 341; (3) that it did not seek

"answers to questions that would have required the assistance of technical and legal advice in understanding the questions and formulating responsive answers thereto," *id.* at 340-41, n. 24; and (4) that it "did not seek information on matters already known to defendants," *id.*

We cannot conclude that the interrogatories served upon plaintiffs in this case would satisfy *Brennan* and *Clark,* were we to follow those rulings. We are indeed convinced that these interrogatories were improperly used as a strategy to reduce class size. Their "necessity" is further questionable since, as appellants point out, they were used in stage one proceedings in which the focus is the broad pattern and practice at issue, not the merits of individual claims. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 360-62, 97 S.Ct. 1843, 1867-68, 52 L.Ed.2d 396 (1977). Individual discovery directed to passive class members would normally be appropriate only at stage two of a Title VII suit, and then only rarely.[3]

However, we decline to approve the use of the discovery sanction of dismissal against passive class members in a class action suit even to the extent that it may be permitted by *Brennan* and *Clark.* Used in a Rule 23(b)(2) setting, a discovery order threatening dismissal for non-compliance amounts to no more than an affirmative "opt-in" device – that is, it re-

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[3]*Western Elec. Co. v. Stern,* 544 F.2d 1196 (3d Cir. 1976), relied on by the appellee, does not decide this question to the contrary. Although there the Third Circuit refused to uphold a lower court order that delayed class discovery until after the defendant had prevailed at stage one of the trial, *id.* at 1199, the court said (and the appellee does not repeat): "If our conclusion can be said to be inconsistent with *United States v. U.S. Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975), we find that opinion unpersuasive." What the Second Circuit found unpersuasive is, of course, the law of this Circuit. *U.S. Steel* held that "the district court may require a class or subclass to come forward, as a part of the class or subclass prima facie case, with some threshold showing of economic loss and causation, if the defendant's evidence has drawn into substantial question the group's entitlement to move into Stage II claimant-by-claimant. In all likelihood the defendant's ability to raise substantial doubt about the group's entitlement will occur only rarely." *Id.* at 1054.

quires passive class members to take positive action to stay in the suit. The Advisory Committee specifically rejected the practice of forcing absent class members to opt into a Rule 23 class action to secure its benefits. As the reporter for the 1966 amendments to the Federal Rules of Civil Procedure put it:

> [R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people — especially small claims held by small people — who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.L.Rev. 356, 397-98 (1967), *cited in Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, ___ n. 4, 105 S.Ct. 2965, 2976 n. 4, 86 L.Ed.2d 628 (1985). *See also In Re Gypsum Anti-Trust Cases*, 565 F.2d 1123, 1126 n. 3 (9th Cir. 1977); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1262 (5th Cir. 1977) (Wisdom, J., concurring).

We therefore conclude that the district court clearly erred in decertifying the plaintiff class in this case for insufficient numerosity.

2. Commonality.

The district court's second ground for decertification was its conviction that the claims of class members lacked commonality. Again, this is error.

The trial judge arrived at this conclusion from his private review of answers to defendant's interrogatories. He found what he described as claims of discrimination over different periods of time; varying allegations of discrimination in salary, promotion, medical coverage, training, job classification, and fringe benefits; and assertions both of no discrimination and of no opinion about discrimination. The judge concluded from this evidence that the class had no common claims, and that members cited only "individual acts of discrimination, not any *policy* of discrimination."

The trial judge's conclusion was erroneous. As we note above, the interrogatories should not have been authorized in the first place. Even had they been properly allowed, the responses of class members to those questions still represented not legal claims, but unformed and unselfconsciously presented impressions. To determine what legal claims plaintiffs allege, a judge must look not to defendant's interrogatories but to plaintiffs' complaint.

At best, the trial judge could only conclude from these answers that some specific claims might not be held by all class members. But Rule 23 does not require that all the questions of law and fact raised by the dispute be common. C. Wright & A. Miller, *Federal Practice and Procedure,* § 1763 (1982) at 603. *See also Johnson v. American Credit Co. of Georgia,* 581 F.2d 526, 532 (5th Cir. 1978). The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs. Nor is it clear from the interrogatories that plaintiffs allege no policy of discrimination; indeed, the "individual acts" they cite could very likely be manifestations of such a policy. Among plaintiffs, "[a]llegations of similar discriminatory employment practices, such as . . . [the] use of entirely subjective personnel processes that operated to discriminate, would satisfy the commonality and typicality requirements of Rule 23(a)." *Carpenter v. Stephen F. Austin State University,* 706 F.2d 608, 617 (5th Cir. 1983) citing *Falcon,* 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15. Just such a subjective personnel policy is a major factor in the allegations here.

The trial judge erred further in determining that the Supreme Court's decision in *Falcon, supra,* invalidated the first judge's "across-the-board" certification on commonality grounds. It is true that the certifying judge relied in part on *Hebert v. Monsanto Co.,* 576 F.2d 77 (5th Cir. 1978), *appeal dismissed on other grounds,* 580 F.2d 178 (5th Cir. 1981), a so-called "across-the-board" discrimination case, to certify the class. And it is true that *Falcon,* as this Court explained, "limits the application of 'across-the-board' suits based on allegations of pervasive discriminatory policies." *Evans v. U.S. Pipe*

& Foundry Co., 696 F.2d 925, 928 n. 6 (11th Cir. 1983). However, this is not the sort of across-the-board certification proscribed by *Falcon.*

Across-the-board suits are cases in which the "courts permit . . . the named plaintiff acting as a 'private attorney general' to raise 'across-the-board charges of employment discrimination through-out an employer's force, and to represent persons who ha[ve] materially different employment situations from the named plaintiff." Schlei and Grossman, *Employment Discrimination Law* at 1217 (1983). This approach "presumes that a plaintiff who has suffered an alleged act of discrimination is qualified to represent all persons of the same basis (*i.e.*, race, sex, etc.) in terms of any and all alleged discriminatory practices and issues." *Id.*

Falcon invalidated one such action, in which a Mexican American employee passed over for promotion in a firm sought to represent a class of "all hourly Mexican American employees who have been employed, are employed or may in the future be employed and all those Mexican Americans who have applied or would have applied for employment had the defendant not practiced racial discrimination in its employment practices." The plaintiff did not even make factual allegations about the firm's hiring practices in his complaint, and the court conducted no evidentiary hearing for certification.

After *Falcon*, the Supreme Court also vacated three appeals court decisions in which (1) the Fourth Circuit allowed discharged employees to represent a class claiming workplace discrimination, *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268 (4th Cir. 1981); (2) the Ninth Circuit upheld certification of a class of future, past and present job applicants with arrest, marijuana or juvenile offense conviction records, *Jordan v. County of Los Angeles*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (9th Cir. 1982); and (3) the Fifth Circuit allowed a university film editor and computer lab worker to represent a class of past, present and future female faculty or staff employees and applicants, *University of Houston v. Wilkins*, 654 F.2d 388 (5th Cir. 1981). Since *Falcon*, this Circuit upheld a district court's re-

fusal to allow a current employee in a seniority suit to represent rejected applicants. *Motor Convoy,* 700 F.2d at 1347.

These fact patterns are clearly distinct from that in the case at bar. Cox and Morgan do not seek to represent all women at ACIPCO "in terms of any and all alleged discriminatory practices and issues." Their pleadings are factual and specific, and their certified claims are limited to compensation, promotion and training policies. This is not by any means an exceptional combination. For example, in a post-*Falcon* decision, the Fifth Circuit approved the certification of a class of blacks and women injured by discrimination in assignment, pay, promotion and termination. *Carpenter,* 706 F.2d at 608.

In short, the class originally certified in this suit clearly satisfied the requirements of Rule 23. It was abuse of discretion to conclude otherwise. We therefore REVERSE the class decertification order.

III. The Individual Claims

After the decertification, the district court tried 21 individual claims in a series of mini-trials, granting recovery in only three of the classes. These decisions are appealed to this Court.

After reviewing the district court's specific findings for each plaintiff, we REVERSE as to all of the 18 losing plaintiffs that appealed their decisions to this Court. We AFFIRM the district court's entry of judgment in favor of the other three plaintiffs, Morgan, Self and Williams, but we REMAND the awards in those cases for separate reconsideration.

A. The 18 losing plaintiffs.

The losing plaintiffs in this case were Belinda Black, Annette Cox, Joyce Crane, Glenda Duncan, Rhonda Edwards, Glenda Glenn, Bernice Huffman, Daphne Gay Johnson, Mary Dianne Lee, Judy Lockard, Jerri Ogletree, Joyce Pandellis, Mary Jane Seabury, Jewell Smith, Patricia Ann Terry, Velma Waldrop, Beverly Ann Walker and Julia Womble. Several errors taint the lower court's decisions against these plaintiffs as a group.

Taken individually, some of these cases present additional grounds for reversal.

First, the district court erred as a matter of law in applying an incorrect burden of proof to the defendant in each of these individual cases. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), provides that in the typical Title VII disparate treatment case, once the plaintiff establishes a prima facie case of disparate treatment, the burden shifts to the defendant to rebut the inference of discrimination by articulating legitimate non-discriminatory reasons for its job decision. As we noted in *Eastland v. Tennessee Valley Authority,* 704 F.2d 613, 618-619 (11th Cir. 1983), the defendant's burden is production, not persuasion. Although the trial judge here did not expressly say that he followed *Burdine* in the mini-trials, his repeated observation that plaintiffs "failed to prove" their claims of discrimination or that ACIPCO "successfully articulated" reasons for its job decisions indicates that he used the *Burdine* standard.

This standard was incorrect. In a pattern and practice case, if the plaintiff can establish "that [sex] discrimination was the company's standard operating procedure," *see Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1855, the burden shifts to the employer to *prove* that the plaintiff was not, in fact, the victim of discrimination. *Id.* at 359, 97 S.Ct. at 1866. *See also Franks v. Bowman Transportation Co.,* 424 U.S. 747, 772, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976). In other words, once a pattern and practice of discrimination is established, a rebuttable presumption that plaintiff was discriminated against because of her sex and is entitled to recovery obtains. The employer may overcome this presumption only with clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy. *See Teamsters,* 431 U.S. at 362, 97 S.Ct. at 1868.

We are conscious that *Teamsters* and *Franks* both involved large classes rather than individual plaintiffs. But the plaintiffs here are not, as in *McDonnell Douglas,* simply "individual complainant[s] seeking to prove one instance of unlawful dis-

crimination." *Id.* at 358 n. 44, 97 S.Ct. at 1866 n. 44. Once the trial court found that ACIPCO in fact had a policy of reserving plant clerical jobs for men, these individuals were in substantially the same position as the *Teamsters* and *Franks* plaintiffs — that is, they had proven that sex discrimination "was the company's standard operating procedure," and they were entitled to the presumption that the complained-of employment practices violated Title VII.

Although the district court points to a gradual "withering" of this discriminatory policy triggered by the filing of EEOC claims in 1973, it made no finding as to when this pattern and practice was withered sufficiently to have no effect on plaintiffs.[4] Thus, we cannot determine from the district court's opinion exactly which individuals at which times should have had the benefit of a presumption of discrimination. Nor can we conclude in any case that the employer clearly met its burden of proving that its actions were undertaken for lawful reasons. For this reason alone, we must reverse the judgments against all the losing plaintiffs.

We note secondly that the district court erred as a matter of law in requiring plaintiffs to show that they had in fact applied for the jobs or promotions in question. *Teamsters* holds that nonapplicants may be entitled to relief where the employer's clear policy of exclusion would make an application a useless exercise. *See id.* at 367-68, 97 S.Ct. at 1870-71. Such a claim "requires two distinct determinations: that [the nonapplicant] would have applied but for discrimination and that he would have been discriminatorily rejected had he applied." *Id.* at 368 n. 52, 97 S.Ct. at 1871 n. 52.

Where no policy of exclusion is actually in place, but the employer continues to hire by word of mouth or other informal

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[4]We cannot accept, without more, the assumption that this policy ended abruptly when the first woman got a plant job at ACIPCO. The court must also inquire whether the discriminatory policy persisted *de facto* — that is, whether women continued to be discouraged from seeking these jobs either directly or through the defendant's continued use of subjective selection criteria and word-of-mouth hiring.

methods, a nonapplicant may still recover. In *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1133 (11th Cir. 1984), we held that

> when there is no formal notice of the job's availability, the plaintiff may have no means, within his own knowledge, of showing whether the employer considered him or not. Furthermore, when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested as well as those who have learned of the job opening and expressed an interest. Accordingly, a plaintiff makes out a prima facie case — that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection — as long as he establishes that the company had some reason or duty to consider him for the post.

The record indicates that the defendant did use informal application procedures. Thus, under *Carmichael,* the employer should have considered each of the losing plaintiffs for any and all positions for which they could show that ACIPCO was on notice that they "might reasonably be interested." Again, since none of the plaintiffs had an opportunity to make such a showing, we are compelled to reverse the judgments against these claimants.

Apart from these across-the-board errors, we note a number of other misinterpretations of law that further taint the judgments against several individual plaintiffs. Two such errors are (1) the court's repeated observation that some of these women have no claim if the jobs they sought were filled by other women and (2) the court's insistence that many of these are non-cognizable "comparable worth" claims in any case. We have settled the former issue in this Circuit. The fact that a member of the protected class received the job in question does not necessarily mean that there is no Title VII violation. *See Nix v. Radio/Rahall Communication,* 738 F.2d 1181, 1185-86 (11th Cir. 1984).

As to the question of comparable worth, we conclude that the lower court has confused the issue. These plaintiffs do not seek what the Supreme Court called, in explaining comparable

worth, "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their jobs with that of other jobs in the same organization or community." *County of Washington v. Gunther,* 452 U.S. 161, 166, 101 S.Ct. 2242, 2246, 68 L.Ed.2d 751 (1981). Instead they argue that ACIPCO's policy of paying men's clerical jobs and women's clerical jobs on two entirely different compensation schemes is discriminatory. They maintain that the traditionally male jobs in the manufacturing division are compensated "objectively" based on a system of detailed job descriptions, standardized evaluations, and publicly-known job classifications, pay scales and review provisions, while compensation for non-manufacturing women's jobs is subjectively determined. At a minimum, this claim if proved entitles plaintiffs to injunctive relief against the disparate compensation schemes, and the trial court erred in failing to grant such an injunction. In cases presenting abundant evidence of consistent past discrimination, injunctive relief is mandatory absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law. *NAACP v. City of Evergreen, Ala.,* 693 F.2d 1367, 1370 (11th Cir. 1982). The maintenance of the separate pay schemes alone conceivably might also entitle plaintiffs to back pay. This issue must be thoughtfully considered, rather than rejected out of hand.

Several further errors appear in the judgments against individual plaintiffs. First, the district court erred in its determination that the injury appellant Mary Jane Seabury suffered from a brief denial of a transfer to the plant was *de minimis.* We cannot accept this characterization. Title VII gives us no license to decide that any injury, however insignificant,[5] may be regarded as *de minimis.* As appellant argues, "[w]hat is small in principal is often large in principle." *Jenkins v. United Gas Corp.,* 400 F.2d 28, 32-33 (5th Cir. 1968).

Second, the district court improperly rejected the claim of

[5]Appellant Seabury figures her cost at $2,750 plus interest. The district court made no finding of the proper damages, but if that amount is correct it is hardly trivial in any case.

appellant Bernice Huffman that she was "demoted" to an inferior job title and duties (although with the same salary) because she was female. The court was mistaken in assuming that this claim was not cognizable under Title VII. The former Fifth Circuit held in *Swint v. Pullman Standard,* 539 F.2d 77, 89 (5th Cir. 1976), that "a Title VII plaintiff does not have to show economic loss to prove discrimination." Job titles and duties themselves are conditions of employment protected by Title VII.

Third, we question the district court's nolding that the two black plaintiffs, Velma Waldrop and Patricia Ann Terry, could not recover for sex discrimination at ACIPCO because they were of necessity parties to a July 1980 consent decree in the *Pettway* race discrimination suit against the same defendant. The lower court seems to have made this determination *sua sponte,* although the defendant did not raise preclusion as an affirmative defense and the issue was apparently not briefed or argued before the court. This is a difficult question that deserves more than peremptory treatment. We are not satisfied from the lower court's conclusory findings of fact (no indication of whether or what Waldrop and Terry would recover under either claim, or calculation of any difference between the awards) and its sketchy conclusions of law (no thorough exploration of the preclusion problem) that this issue was properly considered and decided. In our view, "the district court stopped short of the fact finding and legal analysis required for resolution of this case." *Corley v. Jackson Police Dept.,* 566 F.2d 994, 1001 (5th Cir. 1978).

For the reasons set out above we must reverse the lower court's judgments against the losing plaintiffs. We note that we base our reversal on matters of law subject to plenary review by this Court. *Cathbake Inv. Co., Inc. v. Fisk Elec. Co., Inc.,* 700 F.2d 654, 656 (11th Cir. 1983). However, appellants also allege a number of factual errors in the decisions of the district court. We find it unnecessary to explore these here, given the extent of the legal error coloring these factual judgments. This Court has long adhered to the rule that

> findings induced by or resulting from, a misapprehension of controlling substantive principles lose the insulation of F.R.Civ.P. 52(a) and a judgment based thereon cannot stand. [Citation omitted.]

Corley, 566 F.2d at 1001. Further, in some instances the lower court's findings of fact here on their own lack the sufficiency of detail and exactness required by Rule 52(a). *See id.* at 1003.

Our determination that the court below applied incorrect principles of law and made tainted or insufficient findings of fact determines our disposition of the appeals of the 18 losing plaintiffs. We hold, with the *Corley* Court, "that a remand solely for the purpose of making additional findings of fact and conclusions of law would not suffice to rectify the errors of the district court." *Id.* at 1005. We regret the necessity of drawing this proceeding out further, but in the interest of justice a new trial is clearly required for these plaintiffs. Since in Section II of this opinion we reversed the class decertification that led to much of this confusion and delay, we now REMAND these actions with instructions that the plaintiff class be recertified and that the trial proceed as a Title VII pattern and practice suit.

As to ACIPCO's cross-appeal challenging the award of attorney's fees and costs to the 18 losing plaintiffs as "prevailing parties," we VACATE these awards to await appropriate adjustment after remand.

B. The prevailing plaintiffs.

Appellants Brenda Morgan, Rebecca Self and Karen Williams were the plaintiffs that received judgments in their favor. We turn finally to their claims of error. Because we find these claims well-founded, we REMAND their awards to the district court for further action consistent with this opinion.

Appellants maintain first that they were entitled to injunctive relief against the defendant's practice of refusing to post notice of or to establish objective selection guidelines for jobs in its non-manufacturing divisions. We agree. *See Evergreen*, 693 F.2d at 1370-71. The fact that the court in *Pettway* en-

joined, *inter alia*, discrimination on the basis of sex at ACIPCO is insufficient protection for these plaintiffs for two reasons. First, the latter injunction is not specific enough. These plaintiffs are entitled to an injunction closely tailored to remedy the discrimination complained of as in *Evergreen* (city ordered to publish notice of vacancies, job descriptions, and guidelines for selection) or *Pettway* (employer ordered to post vacancies and use objective selection criteria). Second, the *Pettway* injunction may not apply to some non-manufacturing divisions. The district court made no findings about the extent of its application. Plaintiffs are entitled to a comprehensive remedy.

Second, appellants maintain that their back-pay awards were improperly calculated. Back-pay awards are reviewed under the abuse of discretion standard. *Robinson v. City of Fairfield*, 750 F.2d 1507, 1512 (11th Cir. 1985). However, the court's discretion must be "guided by sound legal principles." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975). Appellants maintain that as a matter of law their back pay should include more than "straight salary." Again, we agree. As our predecessor Court held in *Pettway v. ACIPCO*, 494 F.2d 211, 263 (5th Cir. 1978) (*Pettway III*):

> Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay. Adjustment to the pension plan for members of the class who retired during this time should also be considered on remand.

The district court is instructed to consider these and other additions to straight salary (such as bonuses and interest, *see id.*) in fashioning back-pay awards that will more nearly make these plaintiffs whole. The court should also consider and enter findings on whether any of these plaintiffs is entitled to non-monetary compensation such as retroactive departmental seniority or the award of jobs and promotions denied them on the basis of sex.

Finally, these three appellants contend that their "straight

salary" was miscalculated because the district court resolved uncertainties about pay rates and dates of discrimination in favor of the employer. The former Fifth Circuit held in *Pettway III,* 494 F.2d at 260-61 and n. 149, that "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer." We are bound by that rule.

Accordingly, we VACATE the awards in favor of Morgan, Self and Williams and REMAND them to the trial court for the recalculation of back pay and the entry of appropriate injunctive relief against ACIPCO.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7382

D.C. Docket No. 74-0469

ANNETTE COX, ET AL.,

Plaintiffs-Appellants,

versus

AMERICAN CAST IRON PIPE COMPANY, a corporation,

Defendant-Appellee.

No. 84-7462

D. C. Docket No. 74-469

ANNETTE COX, et al.,

Plaintiffs-Appellants,
CROSS-APPELLEES,

versus

AMERICAN CAST IRON PIPE COMPANY, a corporation,

Defendant-Appellee,
CROSS-APPELLANT.

Appeals from the United States District Court for the Northern District of Alabama

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Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court that the class decertification order is REVERSED, that the judgments against the eighteen losing plaintiffs are REVERSED, that the judgments in favor of plaintiffs Morgan, Self and Williams are AFFIRMED and that the awards on behalf of plaintiffs Morgan, Self and Williams are VACATED and REMANDED for recalculation of back pay and for the entry of appropriate injunctive relief against defendant, in accordance with the opinion of this Court.

It is further ordered that defendant-appellee pay to plaintiff-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 26, 1986
For the Court: SPENCER D. MERCER, Clerk

ISSUED AS MANDATE: MAY 14 1986

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Office of the Clerk
50 Spring Street SW
Atlanta, Georgia 30303-3147

May 5, 1986

TO ALL PARTIES LISTED BELOW:

No. 84-7382 and 84-7462
COX v. AMERICAN CAST IRON, etc.

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

—— The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

SPENCER D. MERCER,
CLERK

cc: Robert L. Wiggins, Jr., Esquire
F. A. Flowers, III, Esquire
Carol H. Wolfe, Esquire
J. Frederick Ingram, Esquire
J. Patrick Logan, Esquire

FILED
May 9, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NUMBER:
AMERICAN CAST IRON PIPE COMPANY,	)	CA-74-M-469-S
	)	
	)	
Defendant.	)	

MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE TO ALTER AND AMEND JUDGMENT

Comes the named individual plaintiffs who are represented by the undersigned counsel, who, pursuant to Federal Rule of Civil Procedure 59, moves the Court for entry of an Order granting a new trial or, in the alternative, for entry of an Order altering and amending the Judgment. As grounds for this Motion, the plaintiffs state the following:

1. The back-pay awarded to Brenda Morgan, Rebecca Self and Karen Williams should include interest from the date of the denial of the job opportunities which form the basis for the defendant's liability. Prior decisions in this District as well as prior decisions which are binding precedent in this Circuit have established that prejudgment interest is an appropriate part of the calculation of back-pay in Title VII cases. See e.g., *Crabtree v. Baptist Hospital of Gadsden, Inc.*, CV # 82-AR-

1849-M (N.D. Ala. Dec. 7, 1983) ("The Court agrees with Crabtree's request for employment of the interest rates promulgated by NLRB for computing pre-judgment interest on her back wage claims. Not only has the NLRB awarded interest at market rates on back-pay awards for many years, but the practice has been approved by the Fifth Circuit and thus by the Eleventh Circuit. *** Furthermore, the use of NLRB's variable 'adjusted prime rates' to compute pre-judgment interest has recently been approved by two other judges of this Circuit, i.e., Judge Clemon . . . and Judge Pointer".); *Davis v. Construction Materials,* 558 F. Supp. 697 (N.D. Ala. 1978); *Thomas v. Jack Marshall Foods,* CV-82-P-2659-S (N.D. Ala. October 11, 1983). These decisions are supported by authoritative appellate precedent which is binding in this Circuit. First, the decision in *Pettway v. American Cast Iron Pipe Company,* 494 F.2d 211, 263 (5th Cir. 1974), establishes that pre-judgment interest is an integral part of a back-pay award in Title VII cases. There the Court held that "the ingredients of back-pay should include more than 'straight salary'. Interest, overtime, shift differentials, and fringe benefits such as vacations and sick-pay are among the items which should be included in back-pay". *Id.* Secondly, the Eleventh Circuit, in two recent decisions has established that NLRB practices and principles are to be applied in calculating back-pay under Title VII. In *Brown v. A. J. Gerrard Mfg.,* 715 F.2d 1549, 1550 (11th Cir. 1983), the *en banc* Court held that the district courts do not have discretion to calculate back-pay without regard to the NLRB model. The Court required all district courts to consistently follow the NLRB practice of not deducting unemployment compensation in Title VII back-pay calculations. More recently in *Darnell v. City of Jasper, Alabama,* (Slip Op. April 23, 1984), the Eleventh Circuit again required the district courts to follow applicable NLRB practices in the calculation of back-pay in Title VII cases. There the Court held that "[t]he back-pay provisions of Title VII were 'expressly modeled on the back-pay provision of the National Labor Relations Act'. *** Although we have discovered no cases ap-

plying the 'quarterly earnings formula' in the context of a Title VII action, we conclude that such a formula more faithfully serves the remedial objectives of Title VII and, in any case, promotes the consistent application of back-pay awards rendered under both Title VII and the NLRA". *Id.* at 2708. The consistent practice under the NLRA has been to automatically award prejudgment interest as a part of any back-pay award. See e.g., *Davis v. Construction Materials, Inc.*, 558 F. Supp. 697 (N.D. Ala. 1983) ("For more than twenty years, it has been the policy of the National Labor Relations Board to award interest on back-pay entitlements".) ; *Winn-Dixie Stores, Inc. v. NLRB*, 413 F.2d 1008, 1010 (5th Cir. 1969) (". . . we think that the only way the employees could be made whole for their loss of earnings [is] for them to draw interest on the amounts to which they became entitled from the date of their illegal discharge. . . .") ; *NLRB v. Globe Products Corp.*, 322 F.2d 694 (4th Cir. 1963). For all the foregoing reasons, the plaintiff's request that their back-pay awards be adjusted to include prejudgment interest at applicable NLRB interest rates.

2. The back-pay award included only "straight salary". As already pointed out, the controlling precedent in this Circuit requires that back-pay calculations include "overtime, shift differentials and fringe benefits". *Pettway v. American Cast Iron Pipe Company, supra* at 263. In terms of Acipco, the two most important ingredients to back-pay are bonuses and overtime. Bonuses are an integral part of all employee's pay at Acipco and were included in the calculation of back-pay in *Pettway*. It is a percentage of the "straight salary" of each employee and can easily be calculated in either one of two ways: (1) compare the plaintiff's gross pay reported to the IRS with the gross pay of the male employees occupying the jobs she was denied; or (2) multiplying the "straight salary" back-pay for each year of by the bonus percentage for each year. The inclusion of bonuses and overtime is mandated by applicable NLRA precedents. See, e.g., *United Shoe Mach. Corp.*, 96 NLRB 1309, 29 LRRM 1024 (1951). The standard text in the field of labor law and the NLRA states that "[t]he make-whole provision of

the back-pay order covers not only wages but also, where appropriate, other emoluments of employment, including vacation benefits, bonuses, shares in profit sharing programs, pension coverage, health and medical coverage, employee owned housing and employee discounts on purchases". Morris, *The Developing Labor Law,* pp. 1658-1659 (ABA Section on Labor and Employment Law 1983). Under the authority of *Brown, Darnell, Crabtree* and *Davis,* the applicable NLRA practice on overtime and bonuses should be applied in the calculation of back-pay. The plaintiff's back-pay should be adjusted to include such factors.

3. Plaintiff Brenda Morgan contends that her "straight salary" back-pay is greater than $19,200 even without adjustment for interest, overtime, bonuses and other factors. The Court found that "other proof establishes that a differential in pay of $200 to $300 per month for comparable positions appertained as between office clerical and plant clerical positions". Memorandum Opinion of April 30, 1984, p. 9. Relevant legal principles establish that the higher rate of $300 should be used as the relevant benchmark in calculating back-pay. The law of this Circuit was established in *Pettway, supra,* where the Court held that "in computing a back-pay award two principles are lucid: (1) unrealistic exactitude is not required; (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer". *Id.* at 260-261. In making this ruling the Court of Appeals in *Pettway* adopted applicable NLRB precedents on this point. *Id.* at 261 n.149. Specifically it stated that "[i]n back-pay cases under the National Labor Relations Act, this Court has consistently resolved uncertainties against the wrongdoing employer rather than the injured employee". *Id.* at n.149. As an example and further support for the application of this principle, the *Pettway* decision refers to *Bowe v. Colgate-Palmolive Co.,* 272 F. Supp. 332, 365-366 (S.D. 2nd 1967), *rev'd* 416 F.2d 721 (7th Cir. 1971). Parenthetically, the decision in *Pettway* cites *Bowe* and states that "[b]ecause preciseness in computing back-pay was not possible, the district

court awarded the minimum which could have been earned. The Court of Appeals reversed, ordering the maximum". *Pettway, supra* at n.149. The reliance on this decision by the former Fifth Circuit speaks directly to the adoption of the $300 pay differential as the relevant benchmark in calculating Brenda Morgan's back-pay. The back-pay period for plaintiff Morgan began to run from the date that the males were awarded the positions which she was denied. For the position of Departmental Clerk this was 1971, according to the findings of fact. Mem. Op., p. 9. For the Computer Operator position this was 1972. *Id.* The earlier date is the one that should be used under the principles of *Pettway*. The evidence shows that plaintiff Morgan even to this day does not earn as much as the male employees awarded the jobs she was denied. For this reason, the relevant back-pay calculation period should be January 1, 1971 until April 30, 1984. During that period, there were 160 months. Multiplied times $300 per month, the plaintiff's straight-time back-pay amounts to $48,000 ($300 × 160 = $48,000). For the foregoing reasons, the plaintiffs request that the judgment be altered and amended to reflect the correct amount of economic loss suffered by Brenda Morgan.

4. The same principles of law recited hereinabove are applicable to the calculation of back-pay for Rebecca Self. The Court's findings of fact included a finding that the relevant pay differential for plaintiff Self was $200 to $300 per month in straight salary. The Court also found that "between 1977 and 1982, Self was denied a promotional transfer because of her sex". Mem. Op., p. 17. Again, it is the plaintiff's understanding that the pay differential between the male employees and herself continues up to the current time. Between January 1, 1977 and April 30, 1984 there were 88 months. For this period, the straight salary loss for Rebecca Self was $26,400 ($300 × 88 = $26,400). If the back-pay is calculated only through the end of 1982 then her back-pay loss is $21,600 (72 × $300 = $21,600). Because of the principles of *Pettway* which requires that uncertainties should be resolved against the discriminating employer, the $26,400 calculation is the most ap-

propriate one for this case. To this amount should be added interest, bonuses, overtime and other benefits.

5. The same reasoning and precedent is also applicable to Karen Williams. The Court found her straight time loss to amount to $200 to $250 per month. The higher amount should once again be used in accordance with the teaching of *Pettway, supra* at 260-261. If it is used, it appears that the Court awarded her back-pay for only 20.8 months ($5200 ÷ $250 = 20.8). The Court found that it was "difficult to ascertain exactly when she should have succeeded in obtaining a transfer but for her sex". Mem. Op., p. 20. The Court also found that she was not the victim of sex discrimination from the very moment of her hire in 1974 and that she obtained the job she sought in 1979. *Id.* at 19-20. Realizing the Court's difficulties with ascertaining the exact date that her economic loss began, the plaintiffs, nevertheless, submit that it began much earlier than April, 1978. The latter date is approximately 21 months prior to the end of the 1979 back-pay cut-off period. Because this Circuit has held that unrealistic exactitude is not required and that uncertainties should be resolved against the discriminating employer, the plaintiffs contend that January 1, 1975 was the appropriate commencement date for the plaintiff's back-pay calculation. That date is consistent with the findings in the Morgan case and gives the benefit of the doubt to the victim of the unlawful practices. Using this date, the back-pay for Karen Williams amounts to $15,000 (60 × $250 = $15,000). To this amount should be added interest, overtime, bonuses and other benefits.

6. Each of the three prevailing plaintiffs contends that a more efficient and reliable method of back-pay calculation is available to the Court which automatically incorporates all straight salary, overtime, bonuses and other benefits. This involves an examination of the IRS withholding forms submitted by the defendant to the federal government for the plaintiffs and the males who obtained the jobs they were denied. By substracting the amount of money reported to the IRS for the plaintiff

from the amount reported for the males occupying the jobs denied to the plaintiffs, an exact rendering of the economic losses suffered by each plaintiff is possible. In instances where more than one male occupied the job in question, averages can be used or, under the authority of *Pettway,* the earliest occupant can be considered as the relevant benchmark. The three prevailing plaintiffs request that this method be used to calculate the plaintiffs' economic losses.

7. The three prevailing plaintiffs also contend that their economic losses are continuing at the moment and for the indefinite future. The male employees occupying the jobs originally denied to the three prevailing plaintiffs are currently earning more than such plaintiffs. For this reason, the Court should order front-pay in order to make the plaintiffs whole from their injuries. See e.g., *James v. Stockham Valves and Fittings Co.,* 559 F.2d 310, 358 (5th Cir. 1977) (In regard to front pay, Court holds "that there are cases in which such relief is appropriate" and that such relief may be "factually compelled" in some cases.); *EEOC v. Safeway Stores, Inc.,* 634 F.2d 1273, 1281-82 (10th Cir. 1980), *cert. denied,* 451 U.S. 986 (1981); *Hill v. Western Electric Co.,* 596 F.2d 99, 104 (4th Cir.), *cert. denied,* 444 U.S. 929 (1929); *White v. Carolina Paperboard Corp.,* 564 F.2d 1073, 1091 (4th Cir. 1977); *Patterson v. American Tobacco Co.,* 535 F.2d 257, 269 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976); *Fitzgerald v. Sirloin Stockade, Inc.,* 624 F.2d 945, 957 (10th Cir. 1980); *U.S. v. Lee Way Motor Freight, Inc.,* 625 F.2d 918, 933 (10th Cir. 1979).

8. The non-prevailing plaintiffs contend that the Court has not considered all of the evidence which was available to support their claims and has not entered findings of fact which addresses each of the claims raised by them. They also contend that the Court's findings against their claims are erroneous and against the weight of evidence.

WHEREFORE, for all the foregoing reasons and for other reasons which are not waived by not being expressly listed in

support of this Motion, the plaintiffs move for a new trial and in the alternative to alter or amend the judgment.

Respectfully submitted,

/s/ ROBERT L. WIGGINS, JR.

Robert L. Wiggins, Jr.
Attorney for Plaintiffs
Suite 716 Brown Marx Building
2000 1st Avenue North
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Motion For New Trial And In The Alternative To Alter And Amend Judgment has been served by United States mail, postage prepaid and properly addressed on the following:

Mr. J. Patrick Logan
Attorney at Law
1600 Bank For Savings Building
Birmingham, Alabama 35203

This is the 9th day of May, 1984.

/s/ ROBERT L. WIGGINS, JR.

Robert L. Wiggins, Jr.

FILED
May 10, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON PIPE COMPANY,	)	CV-74-AR-469-S
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

COMES now the defendant in the above-styled action and moves this Honorable Court pursuant to Rule 59 of the Federal Rules of Civil Procedure for an Order be entered setting aside this Court's April 30, 1984 Judgment in favor of plaintiff, Brenda Morgan, and against this defendant. This motion is based upon the following grounds:

1. In its Order, the Court found that Brenda Morgan had sought various jobs, that males had received such jobs and that "Morgan had the necessary qualifications for one or more of the jobs she sought, and that her failure to obtain one or more of the jobs is traceble to her sex." The defendant, based upon evidence in the record, makes the following showings:

(a) The position of departmental clerk to which the Court refers in its Order and that the plaintiff allegedly sought was a position in the Data Processing Department and was not a plant clerical position. (Tr. 215). This departmental clerk

position was filled by Don Harris on April 12, 1971. (*See* employment history card of Don Harris.)

The position was filled beyond the limitations period for this action. Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. §2000e(5), provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ." The earliest charge that could be relied upon by Morgan was filed by Annette Cox on January 11, 1972, more than 180 days after the filling of the departmental clerk position. Morgan's claim of discrimination based on the failure to promote her to departmental clerk is time barred.

Plaintiff furthermore failed to show that she made application for the job of departmental clerk and failed to introduce evidence showing that the effort would have been futile. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Crawford v. United States Steel Corp.,* 660 F.2d 663 (5th Cir. Unit B 1981).

> MORGAN: "I am not sure about actually going to him when the job was open, but I had previously told him that I wanted to be considered for any opening that came up that would be a promotion to me." (Tr. 190).

The record shows that Don Harris had more company seniority than Morgan and was a returning Veteran.

(b) The second position for which Morgan claims she made application was a computer operator position in 1972. On June 1, 1972, Deryl Leigh Giles was promoted from a departmental clerk in Data Processing to a computer operator. (*See* employment history card of Deryl Giles.) Again, Morgan failed to carry her burden of showing that she made an application for that position or that any effort to do so would have been futile.

> VOWEL: "And to whom did you apply for that job?"

MORGAN: "I talked to Mr. Thomas and I don't remember if it was before they actually filled the job or not . . . ." (Tr. 192).

The Court, in its findings, stated that "Morgan had the higher score on a computer programmer's test." Morgan testified that the test was given in 1970 and that she had made higher on an IBM-administered computer programmer aptitude test than Grant Bailey. There is no evidence in the record that Deryl Giles took the test or was in the Data Processing Department in 1970.

The plaintiff also failed to show that she was qualified for the position of computer operator; moreover, she has failed to show that the selection of Deryl Giles was pretextual. The record demonstrates that Deryl Giles had more company seniority than Morgan and that he had a year of computer training in operation and programming at Bessemer Technical Institute. Mr. Mitchell Thomas, the manager of Data Processing, testified without contradiction that he promoted Giles to the computer operator position over Brenda Morgan because Giles was more qualified for the job; furthermore, that Morgan was not qualified for the computer operator's position in 1972 based on her education and experience. The plaintiff failed to produce evidence to show such decision by the company was pretextual.

(c) The third position that this Court discusses in regard to Brenda Morgan is that for a clerical position in the "storeroom." Morgan testified:

> "On one occasion I was told I was not familiar with the stock in the storeroom and on another, I was told that they weren't sure that this – well, that I would have to go in at an entry-level job in that department which was not open, and they were not sure if, by filling the vacancy, this would open up an entry level job." (Tr. 196-97).

The clerical position sought by Morgan was the position of Storeroom Clerk B in Central Stores. These jobs are positions within lines of progression in the plant and are filled

from within the department pursuant to company policy, and later the consent decree entered in *Pettway*. Morgan has, therefore, failed to demonstrate that the storeroom clerk position was available.

(d) Morgan also testified that she applied for a position in the Time Office between 1974 and 1976. She stated that the position was a time office clerk. Morgan failed to demonstrate to the Court that there was a position available during this period of time, that she made application for the position and that a male employee was hired for that position.

(e) Morgan testified that she made application for a position in valve sales. She did not know the job title, but testified that it was the position that Jerri Ogletree was leaving in '78 or '79; Morgan, therefore, allegedly expressed interest in a Customer Service Representative position in Valve Sales. In any event, Morgan failed to demonstrate that she was qualified for the job and testified that the person who received the job was a college graduate. (Tr. 232). It is not disputed that Morgan is not a college graduate.

2. In its Order of April 30, 1984, this Court stated:

> "Although she did not testify as to the difference, if any, between the pay which she received and the pay which the recipient of any particular job she applied for received, other proof establishes that a differential in pay of $200 to $300 per month for comparable positions appertained as between *office* clerical and *plant* clerical positions."

The defendant shows unto the Court by this motion that only two of the positions for which Brenda Morgan allegedly applied were plant clerical positions, those being in Central Stores and the Time Office. Since the position in Central Stores was filled pursuant to an established company procedure for promotion, Morgan was not qualified for such position. The position for time officer clerk or time-checker is a wage position and at the time of application was compensated at a rate of pay of pay group 5.

3. The claims of Brenda Morgan upon which judgment was rendered are beyond the scope of her EEOC charge.

WHEREFORE, defendant, based on the foregoing evidence, respectfully requests that this Court reconsider its Order entered April 30, 1984 in the above-styled action and alter and amend its findings of facts and conclusions of law pertaining to Brenda Morgan to find that she was not unlawfully denied promotions or transfers to other positions within the company based on her sex. Furthermore, plaintiff has failed to carry her burden of proof as set forth in *Burdine* and failed to demonstrate that the decisions made by the company when it transferred others to the positions in which Morgan was interested was based on discrimination on account of her sex.

/s/ J. Patrick Logan

J. Patrick Logan

/s/ F. A. Flowers, III

F. A. Flowers, III

/s/ Carol H. Wolfe

Carol H. Wolfe

Attorneys for Defendant,
American Cast Iron Pipe
Company

OF COUNSEL:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Alter or Amend Judgment has been served by mail delivery on J. Scott Vowell and Richard A. Meelheim, 900 Massey Building, Birmingham, Alabama 35203 on this the 10th day of May, 1984.

/s/ J. PATRICK LOGAN

Attorney for Defendant

FILED
May 10, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON PIPE COMPANY,	)	74-AR-0469-S
	)	
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

Comes now, the defendant, American Cast Iron Pipe Company, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves this Honorable Court to alter or amend its judgment of April 30, 1984 in favor of Rebecca Self and against the defendant, American Cast Iron Pipe Company. The defendant moves this Honorable Court for an order altering, amending and vacating the aforementioned judgment and entering judgment in favor of the defendant, American Cast Iron Pipe Company. As grounds therefor, the defendant states unto the court that the judgment entered in favor of Rebecca Self was contrary to law on the following separate and several grounds:

1. Rebecca Self was improperly joined as a party plaintiff to this action and therefore was not a proper party plaintiff in whose favor any judgment could be rendered;

2. Rebecca Self has failed to satisfy any of the jurisdictional prerequisites to maintaining an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-(e) *et. seq.*;

3. Rebecca Self has never filed a complaint in this action either originally or by way of intervention or joinder and therefore any judgment in her favor is void;

4. The claims of Rebecca Self adjudicated in her favor are beyond the scope of the complaint and EEOC charges upon which jurisdiction is predicated;

5. Judgment in favor of Rebecca Self on the merits is contrary to law and the established precedent of this circuit;

6. Judgment in favor of Rebecca Self is not supported by the evidence in the record, as the record does not support the existence of a *prima facie* case in favor of Rebecca Self as required by relevant U.S. Supreme Court precedent;

7. The evidence in this case does not support a finding that any employment decision relative to the claims of Rebecca Self was either discriminatory or pretextual;

8. The award of back pay to Rebecca Self is erroneous and not supported by the evidence in that Rebecca Self failed to produce any evidence that she is either entitled to back pay in any amount or that she has lost pay as a result of any allegedly discriminatory act of the defendant.

9. The award of back pay to Rebecca Self is erroneous and contrary to the evidence in that any evidence of alleged loss of back pay was either purely speculative or not related to the claim of Rebecca Self.

WHEREFORE, defendant prays that this Honorable Court enter an order altering and amending its judgment of April 30, 1984 in favor of Rebecca Self and against defendant, American Cast Iron Pipe Company, and enter an order vacating said

judgment and entering judgment in favor of defendant, American Cast Iron Pipe Company.

Respectfully submitted,

/s/ J. PATRICK LOGAN

J. Patrick Logan

Attorney for Defendant,
American Cast Iron Pipe
Company

Of Counsel:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Alter and Amend Judgment has been served on J. Scott Vowell, Esquire, 900 Massey Building, Birmingham, Alabama 35203, attorney for plaintiff, by mailing the same to him by United States mail, properly addressed with first class postage prepaid, this 10th day of May, 1984.

/s/ J. PATRICK LOGAN

J. Patrick Logan
Attorney for Defendant

FILED
May 10, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON PIPE COMPANY,	)	74-AR-0469-S
	)	
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

Comes now, the defendant, American Cast Iron Pipe Company, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves this Honorable Court to alter or amend its judgment of April 30, 1984 in favor of Karen L. Williams and against the defendant, American Cast Iron Pipe Company. The defendant moves this Honorable Court for an order altering, amending and vacating the aforementioned judgment and entering judgment in favor of the defendant, American Cast Iron Pipe Company. As grounds therefor, the defendant states unto the court that the judgment entered in favor of Karen L. Williams was contrary to law on the following separate and several grounds:

1. Karen L. Williams was improperly joined as a party plaintiff to this action and therefore was not a proper party plaintiff in whose favor any judgment could be rendered;

2. Karen L. Williams has failed to satisfy any of the jurisdictional prerequisites to maintaining an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-(e) *et. seq.*;

3. Karen L. Williams has never filed a complaint in this action either originally or by way of intervention or joinder and therefore any judgment in her favor is void;

4. The claims of Karen L. Williams adjudicated in her favor are beyond the scope of the complaint and EEOC charges upon which jurisdiction is predicated;

5. Judgment in favor of Karen L. Williams on the merits is contrary to law and the established precedent of this circuit;

6. Judgment in favor of Karen L. Williams is not supported by the evidence in the record, as the record does not support the existence of a *prima facie* case in favor of Karen L. Williams as required by relevant U.S. Supreme Court precedent;

7. The evidence in this case does not support a finding that any employment decision relative to the claims of Karen L. Williams was either discriminatory or pretextual;

8. The award of back pay to Karen L. Williams is erroneous and not supported by the evidence in that Karen L. Williams failed to produce any evidence that she is either entitled to back pay in any amount or that she has lost pay as a result of any allegedly discriminatory act of the defendant.

9. The award of back pay to Karen L. Williams is erroneous and contrary to the evidence in that any evidence of alleged loss of back pay was either purely speculative or not related to the claim of Karen L. Williams.

WHEREFORE, defendant prays that this Honorable Court enter an order altering and amending its judgment of April 30, 1984 in favor of Karen L. Williams and against defendant, American Cast Iron Pipe Company, and enter an order vacat-

ing said judgment and entering judgment in favor of defendant, American Cast Iron Pipe Company.

Respectfully submitted,

/s/ J. PATRICK LOGAN

J. Patrick Logan

Attorney for Defendant,
American Cast Iron Pipe
Company

Of Counsel:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Alter and Amend Judgment has been served on J. Scott Vowell, Esquire, 900 Massey Building, Birmingham, Alabama 35203, attorney for plaintiff, by mailing the same to him by United States mail, properly addressed with first class postage prepaid, this 10th day of May, 1984.

/s/ J. PATRICK LOGAN

J. Patrick Logan
Attorney for Defendant

FILED
May 10, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON PIPE COMPANY,	)	74-AR-0469-S
	)	
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

Comes now, the defendant, American Cast Iron Pipe Company, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves this Honorable Court for order altering or amending its judgment of April 30, 1984 in that said judgment awards Annette Cox, Joyce Pandellis, Joyce Crane, Glenda Glenn, Bernice Huffman, Belinda Black, Rhonda Edwards, Jewell Smith, Julia Womble, Glenda Duncan, Mary Jane Seabury, Jerri Ogletree, Mary Dianne Lee, Beverly Ann Walker, Daphne Gay Johnson, Judy Lockard, Velma Waldrop, and Patricia Ann Terry their attorney's fees and costs. As grounds therefor, the defendant states unto the court that the foregoing named individuals are not the prevailing parties within the meaning of Rule 54(d) of the Federal Rules of Civil Procedure nor are they the prevailing parties within the meaning of the attorney's fees provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-(e) *et.*

seq. Therefore, the court's award of attorney's fees and costs is erroneous and contrary to law. *Ruckelshaus v. Sierra Club*, ___ U.S. ___, 103 S Ct 3274 (1983).

Additionally, defendant moves this Honorable Court for an order altering and amending its judgment to award attorney's fees and costs in favor of defendant, ACIPCO, as against the aforenamed individuals as, with respect to these individuals, the defendant, ACIPCO, is the prevailing party within the meaning of Rule 54 (d) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-(e) *et. seq*.

WHEREFORE, defendant prays that this Honorable Court enter an order altering and amending its judgment of April 30, 1984 and disallow attorney's fees and costs in favor of the aforementioned individuals and substituting therefor an order granting the defendant, as the prevailing party, its attorney's fees and costs.

Respectfully submitted,

/s/ J. PATRICK LOGAN

J. Patrick Logan

Attorney for Defendant,
American Cast Iron Pipe
Company

Of Counsel:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Alter and Amend Judgment has been served on J. Scott Vowell, Esquire, 900 Massey Building, Birmingham, Alabama 35203, attorney for plaintiff, by mailing the same to him by United States mail, properly addressed with first class postage prepaid, this 10th day of May, 1984.

/s/ J. PATRICK LOGAN

J. Patrick Logan
Attorney for Defendant

5/15/84 Hand delivery
copy to Robert Wiggins

ENTERED
May 21, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON	)	74-AR-0469-S
PIPE COMPANY,	)	
	)	
Defendant.	)	

ORDER

The Court has for consideration the motion filed on May 9, 1984, on behalf of each separate plaintiff for a new trial and in the alternative to alter or amend judgment. The Court sees no reason for further argument or briefs as to the said motion with respect to the following individual plaintiffs: Annette Cox, Joyce Pandellis, Joyce Crane, Glenda Glenn, Bernice Huffman, Belinda Black, Rhonda Edwards, Jewell Smith, Julia Womble, Glenda Duncan, May Jane Seabury, Jerri Ogletree, Mary Dianne Lee, Beverly Ann Walker, Daphne Gay Johnson, Judy Lockard, Velma Waldrop and Patricia Ann Terry. As to each said plaintiff, separately, her said post-trial position is hereby DENIED.

Pursuant to Rule 54(b), F.R.Civ.P., the Court determines that there is no just cause for delay in entry of final judgment in favor of defendant and against each separate plaintiff above named, and the entry of such judgment is hereby DIRECTED.

DONE this 21st day of May, 1984.

/s/ WILLIAM M. ACKER, JR.

William M. Acker, Jr.
United States District Judge

FILED
June 7, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NUMBER:
AMERICAN CAST IRON PIPE COMPANY,	)	CV-74-AR-0469-S
	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Comes now the plaintiffs, by and through the undersigned counsel, who gives notice of appeal from the Order dated April 30, 1984 and May 31, 1984 to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ ROBERT L. WIGGINS, JR.

Robert L. Wiggins, Jr.
Attorney for Plaintiffs
Suite 716 Brown Marx Building
2000 1st Avenue North
Birmingham, Alabama 35203
(205) 252-4065

ENTERED
June 14, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO.
AMERICAN CAST IRON	)	74-AR-0469-S
PIPE COMPANY,	)	
	)	
Defendant.	)	

ORDER

On June 7, 1984, all plaintiffs in the above entitled cause (which, in fact, constituted separate actions consolidated for trial) filed a notice of appeal to the Court of Appeals for the Eleventh Circuit from the orders of April 30, 1984, and May 21, 1984. On May 10, 1984, prior to plaintiffs' said appeal, defendant, American Cast Iron Pipe Company, had filed its own motions to alter or amend the judgment in the cases brought by plaintiffs Rebecca Self, Brenda Morgan and Karen Williams, and defendant had also filed a motion to alter or amend the judgment as to the remaining plaintiffs with respect to their status as prevailing parties. Furthermore, on May 18, 1984, prior to the said appeal, the former attorneys for plaintiffs had filed (and amended on May 29, 1984) a motion for the fixing of attorney's fees. Before plaintiffs filed their notice of appeal the Court had set all pending post-trial motions for hearing on June 19, 1984.

Upon reflection and upon a careful consideration of the post-trial briefs submitted by the parties, the Court now decides that all outstanding post-trial motions EXCEPT the amended motion for the determination of assessment of attorney's fees on behalf of plaintiffs are due to be overruled, and they are hereby OVERRULED. The amended motion for attorney's fees is DEFERRED and is RETAINED until after the appeal is decided, because the outcome of the appeal obviously will affect the issue of attorney's fees, as well as possibly other issues.

Under the circumstances, the setting of June 19, 1984, is cancelled.

DONE this 14th day of June, 1984.

/s/ WILLIAM M. ACKER, JR.

William M. Acker, Jr.
United States District Judge

FILED
July 3, 1984

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANNETTE COX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NUMBER:
AMERICAN CAST IRON	)	74-AR-0469-S
PIPE COMPANY,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Comes now the plaintiffs, Rebecca Self, Brenda Morgam and Karen Williams, by and through the undersigned counsel,, who give notice of appeal from the Final Judgment entered April 30, 1984 and from the Order dated June 14, 1984, to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ ROBERT L. WIGGINS, JR.

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